TECHNICAL WHITE PAPER

Non-Discriminatory Pre-Employment Health Testing: Signposts for Employers in Navigating the Legal Minefield

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1. INTRODUCTION

Any successful organisation no doubt realises the value of recruiting and maintaining exceptional personnel as a key to effective and efficient business performance. In hiring new staff employers consider work skills and qualifications as the fundamental indicators of a person's ability to perform the required tasks. But what about a persons physical qualifications?

Randolph states:

> 'It is axiomatic that fitting a square peg into a round hole is not only difficult, but damages either the peg or the hole. Similarly, placing an individual into a job for which he or she may not be physically qualified increases the risk to the employer and the employee of costly injuries'.[1]

In the wake of a decade of increasing insurance premiums and increasing litigation over issues such as workplace injury and illness, health issues have come to the fore such that employers are seeking new ways to identify and recruit the most *suitable* person for the job in an attempt to lessen the impact of health related problems on profit and productivity. Consequently, the use of pre-employment medical testing is becoming increasingly prevalent in Australia.[2] Whilst this process may be extremely beneficial in the making of sound human resource decisions when utilised to its optimal level, the legal framework has been described as a minefield for employers.[3] There are no specific laws relating to the use of pre-employment screening, but rather its proper use is to be considered in light of Anti-Discrimination, Occupational Health and Safety, Privacy and Equal Employment Opportunity Laws. However, there are some guidelines produced by various associations designed to assist employers in understanding and complying with this myriad of legislation, though it should be noted that these are proscriptive only and do not have the force of law.[4]

The most common difficulties with the health screening process are those which offend Anti-Discrimination Laws. A leading legal commentator in the subject has stated that:

> 'the law relating to the prevention and compensation of industrial accidents and disease has "institutionalised" a form of discrimination against "disabled" people which has as one of its chief instruments pre-employment screening.'[5]

Simply stated the argument is that pre-employment medical screening is a tool that equips employers with extraneous information which potentially results in discriminatory practices in the selection of new employees.

At this point any lawyer would expect red flags to be raised in the minds of employers' considering the use of pre-employment health assessments, with the pertinent question being: How do I screen without offending the law?

In answer to this question, this paper will consider the nature of pre-placement health screening and outline how recently emerging screening practices may provide employers

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[1] D.C. Randolph (2000) "Use of Functional Employment Testing to Facilitate Safe Job Placement" 15(4) *Occupational Medicine: State of the Art Reviews*, 813-821 at 815

[2] On the issue of increasing prevalence see Association of Professional Engineers, Scientists and Managers Australia Professional Update 11(2) February 2001 "Inside Employee Screening" http:www.apesma.asn.au

[3] Eric Curtis ""(2002) "Fit For Work", 73(9) *National Safety Magazine*, October Issue

[4] See for example: Australasian Faculty of Occupational Medicine "Guidelines for Health Assessment for Work", October 1998 and The Equal Opportunity Commission of Victoria "Pre-employment Medical Testing Guidelines".

[5] Richard Johnstone (1988) "Pre-employment Health Screening: The Legal Framework" 1(2) *Australian Journal of Labour Law* 115-146 at 117

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with a useful instrument to assist in job-matching without the inherent risks of institutionalising discriminatory practices evident in the more traditional "medical model" of testing. It is pertinent to first consider the economic benefits to employers in screening to find the most suitable job applicant.

2. BENEFITS TO EMPLOYERS: THE ECONOMIC ARGUMENTS

Whilst the collection of health related information can spark some concern over legal issues there are some very sound economic arguments that can be made which articulate an employer's interest in obtaining such information.

Guthrie notes that there is 'a general perception that such examinations may assist in reducing injuries, absenteeism and sick leave'.[6] American research supports this proposition.[7]

Health professionals providing pre-placement health screening will often cite the advantage of reducing work related injury and illness. This is possible as the aim of this type of assessment is to identify workers with pre-existing injuries and illnesses, which may be aggravated as a result of performing the essential requirements of the job. For example, a job applicant going for a job as a process worker in a factory who has tendonitis will be identified as at risk in the job, as the condition may be aggravated through excessive use of the hands.[8] By enabling employers to identify applicants with pre-existing injuries or illnesses relevant to a particular occupation, decisions can be made about the possibility of making appropriate modification to work areas and duties or alternatively, where this is not possible, acknowledging that the candidate may not be suitable for the job. The implication is that the risks of injury or illness can be ascertained and controlled with the likely outcome being a reduction in injury rates, impacting favourably on the bottom-line, through reduced workers compensation costs and reduced insurance premiums.

Statistics on the total costs of injury and illness suggest that these benefits may be considerable. According to the Australian Bureau of Statistics, almost half a million people experienced a work-related injury or illness during the year ending September 2000.[9] Further, in the 2002-2003 year the total cost of workers' compensation was $7,815 million with the average cost per employee being $972 in the public sector and $931 in the private sector. New South Wales had the highest average cost per employee at $1, 161.[10]

Whilst the benefits of pre-employment testing have not been comprehensively tested in Australia, Nassau, an American commentator suggests that pre-employment screening does not prevent injury but rather, it may have a role to play in reducing severity of injury and lost time due to disability.[11] Either way the economic benefits are manifest as many health related problems experienced by workers are likely to impact negatively on employers in a financial sense.

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[6] Robert Guthrie (2003) "The use of medical examinations for employment purposes" 11(1) *Journal of Law and Medicine* 93-102 at 93

[7] See JM Melhorn (1999) "The Impact of Workplace Screening on the Occurrence of Cumulative Trauma Disorders and Workers Compensation" 41(2) *Journal of Occupational Health* (USA)

[8] This is a real life example where an Occupational Therapist tested for this condition when screening applicants for a process worker job at a NSW food-processing plant.

[9] ABS Publication cat No. 6324.0 "Work-related Injuries, Australia", September 2000 downloaded from http://www.abs.gov.au/Ausstats/abs (accessed 12 August 2004)

[10] ABS Publication Cat No. 6348.0.55.001 "Labour Costs, Australia" downloaded from http:/www.abs.gov.au/Ausstats (accessed 12 August 2004)

[11] Deborah W. Nassau (1999) "The Effects of Pre-Work Functional Screening on Lowering an Employer's Injury Rate, Medical Costs and Lost Work Days" 24(3) *Spine* 269.

Using health assessments as a preventative mechanism to reduce the rate and severity of workplace injury and illness can also assist in reducing the indirect costs and disruption experienced by both employer and employee post injury. Employers who have experienced the frustration and expense of workers compensation claims and the sometimes drawn-out rehabilitation process will understand the stress and disruption involved when workplace injuries occur. Accordingly the purpose of health assessments are to reduce resulting employee relations problems, reduce the rate of employee turnover and reduce the costs of having to recruit and train new personnel as a result of failed worker rehabilitation.

3. OCCUPATIONAL HEALTH AND SAFETY ISSUES AND THE EMPLOYER'S DUTY OF CARE

3.1 THE EMPLOYER'S DUTY TO THE "SUSCEPTIBLE" EMPLOYEE

Aside from achieving some sound economic objectives, utilising pre-placement health assessments as a management tool also serves the dual function of facilitating the fulfilment of Occupational Health and Safety law objectives through its focus on "prevention" and "health promotion". Specifically, the opportunity to identify risks enables employers greater foresight in adhering to the duty of care owed both as a matter of common law and statute to protect the workplace health and safety of employees.[12] The duty also encompasses an obligation to provide a safe system of work.[13] The importance of this is elevated in some circumstances such as where an employee already has some injury or disability.

The English case of *Paris v Stepney Borough Council* recognised that where an employee is injured or more highly susceptible to injury in the sense that a hazard imposes a risk of injury of a more severe nature to one employee than to another, then the employer will owe that employee a higher standard of care relative to the magnitude of risk and the seriousness of potential damage.[14] That case involved a man who was blind in one eye and was employed as a welder. The implication of his disability was that an injury to his good eye would be considered more severe in nature than an injury to the eye of an employee without the disability, as such an injury might render the disabled employee completely blind. The different impact on employees depending on their individual conditions, justified a higher standard of care being imposed with respect to the more susceptible worker, such that greater precautions were necessary to ensure the safety of the disabled worker. Put another way, a workplace may be safe for some employees but not for others depending on their current physical condition.[15] Therefore, it is prudent to understand the individual condition of employees in order to provide a safe system of work for each.

Further, the High Court of Australia held that the provision of appropriate precautions may involve 'a degree of diligence so stringent as to amount practically to a guarantee of safety'[16]. Given the rigorous approach to enforcement of workplace health and safety, employers are expected to take all reasonable precautions in order that this virtual guarantee can be given. The advantage of using health assessments in identifying situations where greater precautions are required is the attainment of an opportunity to assess whether appropriate

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[12] For the general duty to employees see s. 8(1) of the *Occupational Health and Safety Act* 2000 (NSW). Hereafter referred to as the *OHS Act*.
[13] s.8(1)(c) *OHS Act*. For a comprehensive discussion of the duty to provide a safe system of work see the High Court case of *McLean v Tedman &* Brambles Holding Limited (1984) 155 CLR 306
[14] [1951] AC 367
[15] Lea Constantine (1998) "Legal Implications of Pre-employment Medicals" in *Pre-Employment Protocol – Managing Future Risks*, August, Cumberland Health and Research Centre, The University of Sydney at 17.
[16] *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 at 554.

modifications can be made to a job or work area to minimise risks and provide a safe system of work and additionally to asses the attendant costs and disruptions to other workers of making any necessary adjustments. Accordingly, where it is determined that such modifications can not be made or are too costly and impractical, the applicant may be identified as unsuitable for the job as a matter of health and safety. The anti-discrimination law exemptions are clearly relevant here and will be discussed below. Being aware of these legal implications is imperative for employers so that unnecessary negligence suits and prosecutions under OHS legislation can be avoided

In cases involving negligence employers must take care for the safety of employees based upon a standard of care determined by the concept of "reasonable foreseeability". [17] The limits of this concept extend to include liability for facts that an employer ought to have known, as well as for facts actually known. Consequently, the higher standard of care owed to susceptible employees may also be imputed regardless of having no actual knowledge of injuries of illnesses of workers exposing them to greater risk in the workplace. Simply stated the implication is that where employers do not screen employees to identify risks to health and safety, this does not necessarily excuse an employer from not taking additional precautions required as a direct result of conditions personal to a particular employee. This is because employers have a personal duty to each employee to take care for their health and safety – it is not a blanket duty owed to all employees.[18] Consequently, failing to assess the health and fitness of an applicant to perform the inherent requirements of a particular job might leave an employer exposed to liability where conditions exist which might modify the standard of care owed to that particular employee.

Accordingly, the argument regarding exposure to a higher duty of care would tend to support the case in favour of pre-placement health screening. Such assessments operate as an effective tool in the provision of a safe system of work, forming one component in the adopted risk management system. Curtis states that 'effective health and safety management must encompass a whole system approach' and that this entails controlling risks arising from the human cultural and behavioural system, of which health is an integral factor.[19] By identifying problems arising from employee health, risks can be controlled and minimised demonstrating observance of the duty to provide a safe system of work.

3.2 THE EMPLOYER'S DUTY TO "OTHER PERSONS" AND PROVISION OF A SAFE SYSTEM OF WORK

The employer's statutory duty of care also extends to "other persons" who are not employees, with respect to risks to their health or safety arising from the conduct of the employer's undertaking while they are at the employer's place of work.[20] Accordingly, impaired employees may pose greater risk to public health and safety resulting in greater costs to employers through damage claims, costs to avoid risks and hazards and increased public liability insurance premiums. Again a health assessment may provide an integral part of a risk management approach employed to meet statutory obligations.

4. ANTI-DISCRIMINATION ISSUES IN THE PRE-EMPLOYMENT RELATIONSHIP

[17] *Wyong Shire Council v Shirt* (1980) 146 CLR 40
[18] *Anastasios Kondis v State Transport Authority* (1984) 154 CLR 672
[19] Curtis, n3
[20] s.8(2) of the *Occupational Health and Safety Act* 2000 (NSW).

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4.1 THE PROHIBITION AGAINST UNLAWFUL DISCRIMINATION

The utility of pre-placement health assessments in providing economic benefits and assisting employers to fulfil their statutory obligations has accounted for the increasing prevalence of such testing. However, the difficulty for employers is the need to balance these management and policy objectives with the prohibition against unlawful discrimination.[21]

The *Anti-Discrimination Act* 1977 (NSW) (ADA) prohibits discrimination on the basis of disability[22] Direct discrimination on the grounds of disability involves actual or proposed "less favourable treatment" of a person with the disability.[23] The test is objective and intention is irrelevant. Indirect discrimination involves a situation where a term is or is proposed to be imposed, which disabled persons are not able to comply with or would find it more difficult to comply with than those without the disability or simply where the term is unreasonable.[24] Disability is broadly defined in the ADA to include loss of bodily functions and body parts, malfunction, malformation or disfigurement whether physical or mental, illnesses or disease impairing mental functioning. [25] Further, this may involve reliance on remedial devices. The two forms of discrimination are expressed in much the same way in the Commonwealth Act.[26]

Employers should also note that Section 49D of the ADA expressly prohibits discrimination in the pre-employment relationship.

Applying the legislation gives the result that an employer cannot fail to offer a person employment, or offer employment on less favourable terms than is customary, on the basis of disability. In situations where a disabled applicant is otherwise the most suitable for the job, an employer is obliged to provide necessary adjustments to work areas or duties in the form of services or facilities to accommodate the individual. The unjustifiable hardship exemption will be discussed shortly. The situation is somewhat different for current employees. The obligation to provide services and facilities is absolute not being subject to the exemption.

4.2 EXEMPTIONS TO THE PROHIBITION AGAINST DISCRIMINATION

Despite the prohibitive nature of the legislation employers do have some scope for differentiating between candidates with different attributes.

4.2.1 Unjustifiable Hardship

The relevant specific exemptions in this context allows employers to set genuine occupational requirements for the position and allow discrimination on the basis of impairment where this would impose unjustifiable hardship on an employer as defined in s.5, due to special services or facilities being required or to the circumstances of the impairment itself.[27]

However, courts have strictly construed the legislation such that the test for unjustifiable hardship is difficult to satisfy. Employers must provide necessary adjustments to disabled

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[21] Curtis, n3
[22] *Anti-Discrimination Act* 1977 (NSW), Part 4A (Specifically Division 1, s.49A). Hereafter referred to as the ADA.
[23] ADA s.49B(1)(a)
[24] ADA s.49B(1)(b)
[25] ADA s.4
[26] *Disability Discrimination Act* 1992 (Cth)
[27] s.54 ADA

applicants to enable them to perform the job in the form of services or facilities. Factors considered when assessing whether such hardship is in fact imposed include:

- Costs
- Benefits and detriments to the (prospective) employee and to others
- Disruptions to the workplace and to others
- The nature of the disability and the nature of adjustments necessary
- Financial means and circumstances of the employer.

Courts have made it clear that no one factor will be definitive.

Further, as the exemption is not available for current employees it is advisable that employers take steps to assess fitness for the position prior to taking on applicants. Where health problems are revealed the employer will then have the advantage of an opportunity to assess whether appropriate modifications can be made or whether the situation warrants reliance on the exemption. Failure to assess prior to employment will deny employers of this opportunity exposing them to unknown costs to facilitate the workers employment.

4.2.2 Other General Exemptions – Health and Safety

Further, the ADA provides that acts which constitute discrimination are not unlawful, where required to comply with another Act of parliament. [28] This will include acts that are reasonably necessary to protect the health and safety of the public and people at a place of work.[29]

4.2.3 Genuine Occupational Requirements Exemption and Selection Criteria

The most contentious exemption under the act is the right to discriminate based on genuine occupational requirements. Such requirements are generally open to challenge on the basis of "genuineness" and in relation to the methods, which deduce that applicants do not meet standards set for selection. The Victorian guidelines on pre-employment testing suggest that a feature of a non-discriminatory test is that it is limited to assessing *current* health status and should not attempt to predict any future deterioration unless the employer demonstrates that it is reasonable to do so.[30]

The Cambey Case - Testing the limits of "current" health status

The recent decision of *Cambey* in the Anti-Discrimination Tribunal Queensland handed down in 2000 considered the legality of excluding an applicant on the basis that a pre-existing injury was likely to result in the applicant not being able to perform his duties in the future.[31] Cambey's barrister argued that the employer was not entitled to consider future ability using the words 'not even the next day'.[32] This argument was rejected by the tribunal, which found that the employer *lawfully* discriminated within the meaning of the legislation on the basis of a genuine occupational requirement, where a serious knee condition meant that Mr. Cambey was not physically fit to perform the necessary physical activities inherent in carrying out the duties of a ticket inspector without an unacceptable risk of personal injury to

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[28] This was briefly alluded to in the discussion under the *WHS* and will not be canvassed any further.
[29] As required by the *OHS Act* (2000) NSW
[30] The Equal Opportunity Commission of Victoria "Pre-employment Medical Testing Guidelines"; Adam and Hadwen, n12 at 3
[31] *Cambey v Adam, Hadwen and Queensland Rail* [2000] QADT 7 (27 June 2000)
[32] Adam and Hadwen, n12 at 6

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himself and to others.[33] Mr. Cambey's duties included having to run across the railway tracks at different times including when trains were in the vicinity. The injury was of such a nature that Mr. Cambey's knee could potentially lock unexpectedly, as had happened in the past compromising his ability to move safely away from oncoming trains. However, as this had not occurred for a substantial period of time, what was in issue was whether consideration of past history of the knee locking was relevant to determine Mr. Cambey's ability to perform a genuine occupation requirement of the job. In this case, past history was relevant as medical evidence showed that although Mr. Cambey had not experienced the locking symptoms for some time, there was no way to rule out the significant possibility of the symptoms occurring. Coupled with the concern for Mr. Cambey's health and safety past history was clearly relevant to determining Mr. Cambey's current ability to perform the inherent duties of the job.

The successful use of medical screening in the *Cambey Case* in ensuring that applicants met genuine occupational requirements set, is premised on the basis that the testing was specific to the inherent requirements of the job and restricted to considering the circumstances of the individual in question. In contrast reports relying on statistical propensity rather than applicant's overall health, past history and personal circumstances are likely to amount to discrimination.[34] Further, where the testing is not task-specific this will be sufficient to deny the right to discriminate based on a genuine occupational requirement.[35] Clearly, non-specific questions regarding injuries and disabilities that may not be relevant to the duties and inherent requirements of the job will not be acceptable. Most importantly, it is pertinent to ensure that the form of medical or health assessment is capable of differentiating between past and current abilities.

Higginson v Cargill Australia Limited [36]- Challenges to purported "genuine occupational requirements"

A recent decision of the NSW Administrative Decisions Tribunal challenged the application of the "inherent requirements defence" available under s.49D(4)(a). That defence enables an employer to discriminate against a person with a disability who is not able to perform the inherent requirements of the job. This involves two steps. The first is to determine the inherent requirements.

In this case an abattoir employee, Mr. Higginson was required to perform maintenance work, some of which was low level work facilitated by squatting. However, Mr. Higginson underwent a knee operation to remove an arterial blockage resulting in a recommendation from his treating doctor not to flex or extend his knee at more than a 90degree angle, rendering him unable to squat. Medical evidence suggested that ignoring this advice could result in blowing the graft and may cause Mr. Higginson to lose his leg. Consequently, the employer refused to allow Mr. Higginson to return to work for a period of 42 weeks.
The second step is to determine whether the employee (prospective or current) is able to perform the required tasks. Clearly, Mr. Higginson could not squat. However, the employer incorrectly identified squatting as a genuine occupational requirement, when in fact the correct view would identify the ability to perform low level work as the inherent requirement. Evidence showed that there were alternatives to squatting and that the Mr. Higginson was quite capable of getting down on his knees to carry out the low level work. Consequently, the employer was found to have discriminated against Mr. Higginson as they had not satisfied the defence.

[33] Adam and Hadwen n12 at 7 and paragraph 7 of the summary judgement.
[34] *Madafferi v City of Northcote* (1993) EOC 92-512 discussed in Guthrie, n2 at p.98
[35] *Gehrig v McArthur River Mining Pty Ltd* (1997) EOC 92-872
[36] [2001] NSWADT 152

This case is highlights the importance of performing a proper job analysis and differentiating between inherent requirements and preferred methods to meet those requirements. In this regard, employers are advised to seek advice from an occupational physician or specialist who will be able to provide advice regarding modifications to job and or work areas to accommodate physical limitations. As illustrated by this case a purely medical approach tends to focus on diagnosis, prognosis, restrictions and physical limitations. The benefits of the job-matching approach in avoiding these problems will be discussed below.

5. ACHIEVING SPECIFICITY IN PRE-PLACEMENT HEALTH ASSESSMENT: The Job-Matching Approach

Cases where successful challenges to the form and conclusion of testing have been made typically involved tests falling into the "medical model" of assessment. Employers wishing to avoid non-task specific testing and conclusions which are not based on objective health indicators should take note of alternative testing models offering the benefits of the job-matching approach with its superior ability to identify and test for the inherent requirements of a position through the use of job analysis and functional testing.

Whilst traditional medical exams clearly have a germane role to play in the pre-employment arena such as providing urinalysis, hearing and eyesight assessment, testing flexibility and reflexes and taking a medical history, it is clear from the above discussion that these tests themselves may in some circumstances be too general in nature. This raises two difficulties. The first is the potential to offend the legislation through inability to recognise genuine occupational requirements, failure to differentiate between past and current abilities and an inability to provide the level of specificity required for legally defensible testing. The second is the inability to provide a suitable means of cross-matching applicants abilities with the employer's requirements to find the most *suitable* applicant.

Legge asserts that health assessors must differentiate between an individual's safe working capacity and a prediction or speculation about possible injury.[37] Case law supports this view.[38] Further, reports relying on statistical propensity rather than applicant's overall health, past history and personal circumstances are likely to amount to discrimination.[39] Likewise, tests that are not task-specific will deny an employer the right to discriminate based on genuine occupational requirements.[40] Anecdotal data collected during traditional medical exams may not be sufficient to meet these stringent requirements of the law.

The alternative to using the "medical model" of assessment is to use occupational physicians and specialists who are able to offer specialised functional assessments. These may incorporate all of the traditional elements of a medical assessment combined with testing aimed at objectively measuring a person's functional capabilities. There are a number of different types of functional assessments available, all of which attempt to observe applicants performing tasks which are designed to assess functional abilities and limitations.

Specifically, the relatively new practice of "Job Matching" has been formulated to avoid discriminatory practices by providing employers with objective findings on which to base

[37] Jennifer Legge (2004) "Pre-employment functional assessment as an effective tool for controlling work-related musculoskeletal disorders: a review" 18(2) *Ergonomics Australia* 27-30 at 27
[38] See above discussion on *Cambey Case* at p8-9.
[39] *Madafferi v City of Northcote* (1993) EOC 92-512 discussed in Guthrie, n2 at p.98
[40] *Gehrig v McArthur River Mining Pty Ltd* (1997) EOC 92-872

recruitment decisions, with some assessment types even offering job simulation. This enables assessors to observe whether a person is currently fit to undertake the physical demands of the job. Job Matching involves undertaking a "Job Analysis" to identify the essential requirements of the functions in each job role. This is important in order to justify recruitment decisions based on inability to perform genuine occupational requirements.

This analysis may involve a number of steps depending on the nature of the position. If the organisation has not performed its own analysis, the first step involves consultation with the prospective employer with a view to collecting information detailing all the tasks and duties that the applicant would be required to perform. In some cases this will be sufficient as a role such as secretary may involve a generic set of functional requirements. In other cases where the tasks may not be customary to a particular job title or role, a visit to the worksite may be necessary as a second step in the process. This step may involve any of the following: Further questioning of the employer on specific job requirements, observing and questioning persons currently employed in that role, an inspection of the specific layout and design of workstations including an ergonomic analysis and an assessment of the necessary functional capabilities required to adequately perform the inherent requirements of the job as identified through steps one and two. Once this process has been undertaken, the assessor is then in a unique position to design a comprehensive health assessment simulating the real work environment, using standardised tests and specific health indicators allowing an objective comparison with the inherent requirements of the job.[41]

5.1 COMPARING JOB ANALYSIS WITH THE "MEDICAL MODEL" OF HEALTH ASSESSMENT

The disparity between the two approaches appears to be becoming more marked over time. In a discussion regarding the standards which have developed in relation to "medical" assessments the presenters at an annual conference of the Safety Institute of Australia commented that:

> 'Over time, the rationale for standards applied lost any relevance to the task at hand and left both potential employees and employers vulnerable, not to mention the doctor who declares the applicant "fit" – for what?'[42]

This statement is suggestive of the current discourse, which is critical of the generality of the medical approach and its failure to keep touch with the requirements of the job. Rothstein notes that 'overall, it has been difficult and costly to develop job-related and non-discriminatory medical criteria'.[43] The environment in which medical testing is often carried out might also be described as one devoid of the necessary context to provide specific standards by which to achieve objective and reliable results. Accordingly, the need arises for health assessors to ensure that sufficient 'field work' is undertaken to identify the essential requirements of a job and therefore the requisite standards which individuals can justifiably be asked to comply with.

Ferguson argues that occupational medicine with its strong emphasis on individual clinical treatment of illness and injury is unfortunately not matched by the diagnostic and therapeutic competence of most practitioners who lack the same degree of skill in illness prevention and health promotion.[44] Consequently, general practitioners applying the

[41] Sanjiv Parmar, B(Sc) OT, Personal Communication, 15 May 2004

[42] Dr Keith Adam and Dr Ian Hadwen (2000) "Pre-employment examinations: A necessary but insufficient procedure" paper presented at the 8th Annual Conference of the Safety Institute of Australia (Qld Division), August

[43] Mark A. Rothstein, (1989) *Medical Screening and the Employee Health Cost Crisis*, The Bureau of National Affairs, Inc., Washington, D.C. at 43.

[44] D Ferguson et al (1986) 'Historical Perspective' *Occupational Health and* Safety, Australian Medical Association, Glebe NSW cited in Quinlan and Bohle, n8 at p.39

medical model of testing are not able to achieve the same degree of specificity in job-matching through pre-employment assessments, which not only makes that model unsuited for the purpose of making sound human resource decisions, but brings into question its ability to avoid the use of discriminatory practices. Further the medical model has been criticised for decades[45] for its failure to advance beyond diagnosis and treatment of injury and illness after the fact. Biggins argues that:

> 'This situation has arisen because medicine has become unreasonably preoccupied with curing sick workers, rather than producing healthy work environments'.[46]

Given the obvious limitations of the medical model, Ferguson concludes that the use of any form of medical testing in managing occupational health and safety is therefore best managed and understood by multidisciplinary teams[47], thus placing greater emphasis on the role to be played by ergonomists, occupational therapists and industrial psychologists[48] who are best placed to deliver on the promise of injury prevention. Further, Louise Beard, the Legal Officer from the Association of Professional Engineers, Scientists and Managers Australia in discussing her view of best practice in employee screening, has indicated that support from employee associations is limited to those screening procedures 'which have been developed to give effect to the principles of matching the most appropriate candidate with the particular requirements'[49] of a job.

6. CONCLUSION

A comparison of the traditional "medical model" with the more recent job-matching approach reveals that the element of specificity required in making pragmatic human resource decisions whilst concurrently providing objective, legally defensible information is evidently lacking. The newer approach referred to here as "job-matching" through the use of functional assessments, provides the necessary and indispensable element of specificity in extracting only that information regarding the health and functioning capabilities of applicants which is directly relevant to the demands of the job in question. As mentioned above, this requires that health assessors be prepared to undertake sufficient "field work" in identifying the criteria against which applicants will be assessed.[50]

This paper, demonstrates the importance of identifying the specific requirements of a job and ensuring that testing is carried out, interpreted and relied upon in a manner, which has regard to the genuine occupational requirements of a position. The nature of the job-matching approach appears to be more suited to observance of the legislative framework by reason of the tools utilised to meet its objectives, such as job analysis and functional assessment, which typically do not form part of the methodology utilised in traditional medical testing. Additionally, employers utilising the services of occupational physicians and therapists will benefit from the opportunity to obtain advice regarding the possibility of making adjustments to work sites and tasks through the provision of services and facilities - a consideration required by the Anti-Discrimination legislation. In most cases an occupational therapist or occupational physician is much better placed to offer advice regarding

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[45] A Davis and J George (1988) *States of Health: Health and Illness in Australia*, Harper and Row, Sydney in Quinlan and Bohle n8 at p.41.

[46] Quinlan and Bohle n8 at p.41 paraphrasing D Biggins (1986) 'Focus on Occupational Health: What Can Be Done', 47 *New Doctor* 6-10

[47] D Ferguson, (1988) 'Occupational Medicine in Australia: The Past, the Present and the Future', 4(6) *Journal of Occupational Health and Safety: Australia and New Zealand* 481-88

[48] See Quinlan and Bohle n8 at p.45.

[49] APESMA (2001) "Inside Employee Screening" 11(1) Professional Update http://www.apesma.asn.au (Extract from Joydeep Hor and Steven Andrew (2001) *Inside Employee Screening*, Centre for Professional Development reproduced with permission from CPD publications).

[50] Such as a "Job Analysis"

appropriate workplace modifications or give recommendations regarding apposite aids and equipments which may alleviate the problem. Many of these occupational specialists also offer advice to job applicants during assessments, regarding correct manual handling techniques – an important step in providing a safe system of work for employees through the provision of appropriate training.

In a testimonial obtained by an occupational therapist conducting pre-placement suitability assessments, Peter Ross the Human Resources Manager of Rheem Australia stated:

> 'For some time we have been concerned the traditional pre-employment medicals were not shedding light on applicants' ability to physically do the job. This was due to management not being specific about its requirements and also fearing discrimination complaints…. [The] solution was a comprehensive health and functional suitability assessment tailored to the specific requirements of our factory. I saw it in action and one applicant jokingly commented, "it was harder than doing the job". Hence, I now have 100% confidence that all new hires can do the job without the prospect of harm.'[51]

Given the myriad of legislation regulating the pre-employment relationship and the competing demands of OHS and Anti-Discrimination legislation, employers are advised to carefully consider which form of health assessment are best suited to their organisation. As pointed out by Randolph in the introductory paragraph to this paper, effective management decisions should consider "physical qualification" in addition to those which are customarily considered.

[51] Peter Ross, Human Resources Manager – Rheem Australia

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